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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 748

T. ROLAND BERNER and ARTHUR S. LESSER, Executors of The Estate of WILLIAM KAPELL, deceased,

Petitioners,

v.

BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp., and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as QANTAS EMPIRE AVIATION, LTD., a Foreign Corp.,

Respondents.

REPLY BRIEF FOR PETITIONERS

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IN THE

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T. ROLAND BERNER and ARTHUR S. LESSER, Executors of The Estate of WILLIAM KAPELL, deceased, *Petitioners,* *v.* BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., a Foreign Corp., and BRITISH COMMONWEALTH PACIFIC AIRLINES, LTD., now doing business as QANTAS EMPIRE AVIATION, LTD., a Foreign Corp., *Respondents.*	No. 748

REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition is less remarkable in what it says than in what it passes over in silence. It gives silent treatment to our demonstration from the record that the trial court correctly found wilful misconduct as a matter of law. It fails to meet our point that a discretionary order for a new trial will not be disturbed by the appellate court's substituting its judgment for that of the trial judge. It ignores the plain conflict as to federal law presented by the issue of collateral estoppel.

I

COLLATERAL ESTOPPEL ISSUE PRESENTS CONFLICT OF DECISIONS AS TO IMPORTANT MATTERS OF FEDERAL LAW—UNDER THE U. S. CONSTITUTION, ACT OF CONGRESS, AND DECISIONS OF THIS COURT. DECISION BELOW ALSO CREATES ANOMALY WHICH REQUIRES REVIEW IN THE INTERESTS OF JUSTICE.

1. Respondents' Brief in Opposition is in error in stating (p. 10) that the only ground for *Wiener's* rejection of the doctrine of mutuality was the law of Nevada. An independent, alternative ground was that federal law is applicable and that it now rejects said doctrine:

> "Throughout the Federal Rules of Civil Procedure, the Judicial Code and other statutes of the United States, the recurrent phrase is found 'in the interest of justice.'
>
> "It would be a travesty upon that concept to now require these plaintiffs who are the survivors of passengers for hire on the United Air Lines plane to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in the 24 consolidated cases tried at Los Angeles. There is every reason 'in the interest of justice' for not invoking the rule requiring identity of parties, and no reason in justice or law for invoking it in these cases."

This holding appears in 216 F. Supp., at 728-9. It follows and appears to be the conclusion from the citation of authorities in the U. S. Courts of Appeals for the Tenth, First, Sixth, Third and Ninth Circuits as well as in the Supreme Court and several U. S. District Courts. *Id.* That federal law rejects mutuality as a requirement of collateral estoppel is also the holding in *Bruszewski* v. *U. S.*, 181 F2d 419

(C. A. 3). On the *Wiener* appeal, the Court of Appeals for the Ninth Circuit stated: "We affirm and adopt herein as our own the district court's treatment of the issue of mutuality of collateral estoppel, 216 F Supp. at 725-729." 335 F2d, at 404. It may be noted that Judge Hall decided the first case while sitting in the U. S. District Court for California, which he then held, sitting by assignment in the U. S. District Court for Nevada, was *res judicata* of the action there pending. So, contrary to respondents' position and that of the Second Circuit in the decision below, the fact that Judge Ritter sat in *Halmos* as well as in the present Kapell case, is no reason at all for refusing to predicate an estoppel in the present case on the *Halmos* judgment of liability.*

2. *Wiener* considered that Nevada law, as the *lex locus delicti,* would govern if collateral estoppel is a question of "substantive law as distinguished from procedural." 216 F Supp., at 726. But the fact that "this question involves constitutional rights concerned with due process and the right to a jury trial," *id.,* does not stamp it as substantive rather than procedural. Quite the contrary. Due process in this context is plainly a procedural, federal question, *Hanna* v. *Plumer,* 380 U. S. 460; and the matter of jury trial in a federal court emphasizes the procedural, federal nature of the question. *Byrd* v. *Blue Ridge Rural Elec. Co-Op,* 356 U. S. 525.

3. Since the first judgment is that of a federal court, it is the supreme law of the land; hence, the effect to be given to it is a federal question as a matter of constitutional law. *Kern* v. *Hattinger,* 303 F2d 333, 340 (C. A. 2). The same result follows from the principle of 28 U. S. C. § 1738 (ap-

*Judge Ritter became the trial judge by assignment of Chief Judge Ryan, upon respondents' removal of the case from the state court to the federal court.

pendix hereto), the full faith and credit statute, which makes the effect of a judgment of a court, here a federal court, depend on the "law or usage" of that court.*

4. Furthermore, respondents and the court below wholly ignored the fact that the issue is, what effect shall be given to a determination under a U. S. treaty. The substantive question is thus one of federal law and the effect to be given to a determination under it should also be a federal question, in order to assure uniformity. That the issue arose in a diversity case does not make it any the less a federal one *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U. S. 89, 92. It is *a fortiori* if the treaty creates a cause of action.

5. Finally, in *Gondeck* v. *Pan Amer. World Airways*, decided this term (Oct. 18, 1965), 15 L. Ed. 2d 21, the Court granted certiorari to review Gondeck's case, in "the interests of justice", "since of those eligible for compensation from the accident, this petitioner stands alone in not receiving it", *id.* page 23. Our case falls into that category. As to one passenger in the fatal crash over San Francisco, a judgment was obtained against the carrier for $35,000. *Halmos.* Respondents do not deny that settlements were reached providing compensation as to the remaining pas-

*Moreover, the California law does not appear to have been stated correctly by the Second Circuit in the decision below; see *Wiener*, where a U. S. District Court Judge from California discussed the California authorities, 216 F Supp., at 726-727. In his view, and, by adoption, that of the Ninth Circuit (covering California), the decisions of the Supreme Court of California are broad enough to support collateral estoppel, without mutuality, in the multi-victim accident situation. *Wiener, id,* n. 15, distinguished *Nevarov,* an intermediate court decision, the only California authority relied on below; see our Petition, Appendix 15a. And the court below conceded, *id,* that two California Supreme Court authorities in point looked in the direction of holding that the carrier was estopped by the first judgment.

Thus, even if California law applies, the decision below fails, for that reason, to give full faith and credit to the *Halmos* judgment, a matter for important concern to the Supreme Court.

sengers, other than petitioners' decedent. Compensation as to all passengers but one, and imposition of a $7,741.25 bill of costs as to that one, is an anomaly which calls for review in the interests of justice. The prevention of such anomaly is also one of the purposes of the rule of collateral estoppel.

6. In sum, there is not only a conflict of decisions, as to federal law, between the Ninth and Second Circuits. In addition, the decision below raises a novel and important question of federal law which merits the consideration of this Court, especially since the decision below appears to answer that question: (1) as to whether federal law applies, in contravention of principles established by the Constitution, Congress, and the Supreme Court, and (2) as to what the federal law should be, counter to "trends in modern legal thought", *Graves* v. *Associated Transport, Inc.*, 344 F2d 894, 896 (C. A. 4, April 1965); see numerous federal and state authorities collected in 216 F Supp., at 728 and the Third Circuit's holding in *Bruszewski, supra.** The decision below creates an anomaly which should also be corrected in the interests of justice. *Gondeck, supra.*

II.

NEW TRIAL CLAIM, NOT "NEW AND UNSUPPORTABLE", RAISES IMPORTANT ISSUES OF COURT OF APPEALS' ABUSE OF POWER AND OF PLAINTIFFS' RIGHT TO TRIAL BY UNPREJUDICED JURY.

The provision of Federal Rule of Procedure 50(c) that an order for a new trial may be reversed "in an appropriate

*The question of collateral estoppel in the absence of mutuality was presented to the Supreme Court in *Maryland* v. *U. S.*, 381 U. S. 41 but became moot because the Court, at the same time that it decided that case, reversed the judgment that had been relied on for the estoppel, see *id*, at 53, n. 38. That note referred to the *Wiener* decision and stated that the District Court decision rejecting mutuality of estoppel was affirmed "on other grounds". This would appear to be inadvertent, as the Court of Appeals stated expressly that it adopted as its own the entire District Court opinion on the mutuality issue; see *supra*, p. 3.

case" is not in issue. Respondents make no effort to show that this was an appropriate case.

1. Respondents are in error in contending that Petitioners' claim of jury prejudice is "new and unsupportable" (p. 5). That claim was, of course, as recognized by the Court of Appeals (Pet., Appendix p. 19a), the core of the motion for a new trial granted by the District Court. It was supported by many grounds enumerated in the Petition (pp. 12-15) and ignored by respondents.

2. Although one of the grounds enumerated, the confusing nature of the charge, was not in so many words excepted to in the trial court, a correct charge was requested and turned down (Pet., 14-15) and the confusing nature of the charge (*id.*) was at least implicitly recognized by the District Court, since, in its decision granting the motion for new trial and judgment n.o.v., it applied a rule inconsistent with part of the purport of the charge; cf. 219 Supp., at 360 and 363, with 219 Supp., at 323 and 325. Respondents also ignore the well-settled rules that plaintiffs may rely on whatever supports the District Court's decision in their favor (e.g. *Helvering* v. *Gowran,* 302 U. S. 238, 245-7) and that the power to correct plain error in the interests of justice is inherent in the Federal trial and appellate courts (e.g. *Mazer* v. *Lipschutz,* 327 F2d 42, 52 (C. A. 3)).

3. Respondents concede that there is nothing new in petitioners' attack upon the jury's verdict as irrational. Their brief ignores the improper and prejudicial remarks to the jury by respondents' trial counsel, which our Petition pointed out (pp. 13-14). Moreover, the verdict itself stands as irrefutable proof of confusion or prejudice. To return a verdict for respondents, the jury had to find that they had proved that defendants and their agents had taken all neces-

sary measures to avoid the crash, or that it was impossible for them to take such measures. Since the defendant deliberately refused to pass on to its pilots the CAA's directive requiring maintenance of minimum altitude in the crash area (a finding not challenged and evidently accepted by the Court of Appeals) the verdict for defendants is irrational and contrary to law. This is so particularly in light of the defendants' concession that they had not carried their burden. (Petition, footnote p. 5; *id.* at p. 15). Respondents do not, even now, question the correctness of their counsel's statement.

Respondents, to justify the unsupported verdict, seize upon the rhetoric of plaintiff's trial counsel, taken out of context. Petitioners' trial counsel had explained to the jury how damages should rationally be determined, based on the evidence of the deceased's earning power, his life expectancy, etc. He asked the jury for a rational verdict, not one arrived at arbitrarily. Rather than the latter, he said, give zero.* The Court of Appeals has held that the jury was entitled to take counsel literally and ignore the Court's charge; so that the trial judge could not set the verdict aside, even though admittedly there was no evidence to support it! In one breath the Court of Appeals throws out the concession of respondents' counsel, in open court, that there is no evidence to support a verdict for respondents; in the very next, it holds petitioners so bound by its counsel's hyperbole that a zero verdict would be preferable to an arbitrary one, that petitioners are estopped to move to set it aside (Pet. Appendix 19a-20a). This is not only a shocking denial of justice; it is a travesty.

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*"This and the other, and the property damage, these things should be added, even to the last cent, because if you are going to be right about these things let's be right, let's be all the way right. If we are going to be wrong, let's be all the way wrong and return a defense verdict for zero, not for any $8,300, and not for any $50,000, or a half. Let's be logical, and let's be right." (SM 1935)

4. Respondents complain that the maintenance records in the record were offered by petitioners. These records show that the transmitting equipment was operating normally both immediately before and immediately after the crash, and that it had operated normally for a long time before (D. App. 85a-90a, 368a, item 7). Respondents' counsel, although cautioned not to do so by the trial judge (the trial court had ruled that any evidence of malfunction was too remote in time to be properly considered by the jury), argued to the jury that the equipment was not working normally (Petition p. 14).

5. Respondents make no mention of their deliberate failure to produce documents in their control, pursuant to the trial court's orders (Petition p. 15). The Court of Appeals' suggestion that the non-produced documents might be favorable to respondents gives a party the benefit of its own wrong (Pet. App. p. 13a).

In short, respondents fail to refute petitioners' showing that the Court of Appeals abused its power in upsetting the new trial order and deprived plaintiffs of a trial by an unprejudiced jury.

III

CARRIER'S MISCONDUCT HERE RAISES IMPORTANT QUESTION OF FEDERAL POLICY

1. The question of whether federal air safety regulations may be violated with impunity is, we submit, of great public importance, as is the question of some compensation (limited or unlimited) under the Warsaw Convention for victims of crashes resulting from such violations. Respondents pass over these questions.

2. Respondents make no mention of the issue of wilful misconduct of BCPA at headquarters. Yet, our petition

(pp. 7, 21) demonstrates that the judgment below is in error and that the judgment n.o.v. should be reinstated.

3. Respondents wholly ignore the undisputed evidence and respondents' concessions referred to in our demonstration (Petition pp. 5-7, 16-20) that the pilot was guilty of wilful misconduct as a matter of law. Their characterization of it as "circumstantial" is designed to evade the issue, not to inform this Court of what the case really involves.

Neither the respondents nor the Court of Appeals cites any evidence to support the jury verdict. *Ipse dixit*—"this record," "the evidence shows", "there is evidence", or "the evidence also suggests" (App. 11a)—these point to what is the fact; that there is no such evidence. Thus *Lavender* v. *Kurn,* 327 U. S. 645, does not support the decision below.

CONCLUSION

WE SUBMIT THAT AMPLE GROUNDS HAVE BEEN PRESENTED, AND NOT REFUTED, FOR GRANTING CERTIORARI.

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December 21, 1965

APPENDIX

28 U.S.C.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.